United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

To be argued by

Howard L. Jacobs

75-1082

B
P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

-against-

MARIE WILEY,

Appellant.

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Docket No. 75-1082

BRIEF FOR APPELLANT WILEY

Appeal From A Judgment of Conviction Rendered In The United States District Court For the Southern District of New York

HOWARD L. JACOBS, P.C.
401 BROADWAY
NEW YORK, NEW YORK 10013
431-3710

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STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal by Marie Wiley from a judgment of the United States District Court for the Southern District of New York (The Honorable John M. Cannella) rendered January 22, 1975, after a three day jury trial, convicting appellant of conspiracy to violate the Federal Narcotic laws in violation of Title 21, United States Code, Section 846. Appellant Wiley was sentenced to seven (7) years imprisonment by Judge Cannella.*

STATEMENT OF FACTS

The Proceedings Below

Appellant Wiley was indicted in three counts of a four count indictment with Charles Clark a/k/a "Nick" and Nathaniel James. She was charged in Counts Two and Three with aiding and abetting in the distribution and possession of cocaine on October 17 and 24, 1973. Count One charged her with conspiracy with Clark and James to distribute and possess narcotic drugs.

On November 25, 1974 the trial commenced as to appellant Wiley and James. Clark was a fugitive and severed from the trial. On November 27, 1974 the jury returned its verdict acquitting appellant Wiley on Counts Two and Three the two substantive counts and finding her guilty on Count One, the conspiracy count. James was acquitted on Count Four, a substantive count and found guilty on Count One.

Appellant Wiley is presently incarcerated having failed to

* On March 13, 1975 James was sentenced by Judge Cannella to three (3) years imprisonment. On March 14, 1975 Clark pleaded guilty to Count One and is due to be sentenced on May 14, 1975.

post $15,000 bail fixed by Judge Cannella.

The Government's Case

On October 17, 1973 Police Officer Dorothy Johnson met appellant and another female at the Blue Rose Bar on 85th Street and Amsterdam Avenue in Manhattan. Appellant told officer Johnson defendant Clark had sent her to take Officer Johnson to a location where she could purchase an ounce of cocaine. Officer Johnson told appellant she preferred doing business with Clark because he would be able to "back up" the package. Appellant said she'd get in touch with Clark. She made a telephone call and then told Officer Johnson she'd be back shortly (19-20, 60, 85-86).*

Appellant then drove in her car to 95 West 95th Street where she got Clark and drove him to the Blue Rose Bar. They both went in the bar. Officer Johnson spoke to Clark about getting the ounce of cocaine she wanted. Clark said it would cost $1,200. He said he wanted Officer Johnson to know what she was getting and was therefore taking her along. Clark and Officer Johnson left appellant in the bar and drove in appellant's car to 240 West 104th Street where Clark got out and entered the building. He returned in a few minutes and they drove around the block to 104th Street and Broadway where a man named Blind entered the car. The three of them drove to 106th Street where Clark and Blind left the car and entered the Casbah Lounge. A few minutes later Clark re-entered the car and gave Officer Johnson

* Refers to pages of the trial transcript

a sample of cocaine. They drove through Central Park where Officer Johnson looked at the sample (24-26, 86-87).

Clark then drove to 105th Street between Columbus and Amsterdam Avenues where he exited the car and again went to the Casbah Lounge. After a few minutes Clark, Blind and a third man left the Casbah Lounge and rejoined Officer Johnson in the car. They drove to 104th Street and Broadway where Blind got out. Clark then took Officer Johnson and the other man to 165 West 85th Street and he and Officer Johnson went to 85th Street and Amsterdam Avenue where they re-entered the Blue Rose Bar. Clark told Officer Johnson it would take a few more minutes and left the bar. He walked around and then went into 165 West 85th Street for a few minutes. He then returned to the Blue Rose Bar and invited Officer Johnson outside to her car. In the car, Clark delivered an ounce of cocaine to Officer Johnson and received $1,200 from her (26-27, 87-88).

On October 24, 1973 Officer Johnson again went to the Blue Rose Bar where she met Clark and appellant. She discussed with Clark, in appellant's presence, the purchase of another ounce of cocaine for $1,200. The three of them, Clark, Officer Johnson and appellant then drove in Officer Johnson's car to 16 West 88th Street. Officer Johnson drove the car, Clark sat in the front passenger's seat and appellant sat in the back. In the car, near 16 West 88th Street, Clark gave Officer Johnson another ounce of cocaine and received $1,200 from her (31-33, 89-90).

On October 31, 1973 Officer Johnson, once again, went to the Blue Rose Bar where she met Clark. After a short while Clark left the bar and returned shortly with defendant Nathaniel James and another man. After a few minutes Officer Johnson, Clark and James drove in Clark's car to 104th Street and West End Avenue where Clark and James got out. They returned in about thirty minutes and Clark told Officer Johnson she'd have to wait if she wanted good cocaine because there were police on the block. Clark gave her a sample of cocaine and they drove to a bar on 106th Street and Broadway. In the bar Clark and James made several phone calls (38-41, 53-54, 91-92, 95-96).

While in the bar Clark told Officer Johnson that James was his "tester", trusted friend and that in his (Clarkes) absence, James would be handling the business for him and she could go directly to James for narcotics (54-55).

After about forty five minutes the three of them drove to 106th Street between Columbus and Amsterdam Avenues, where Clark got out and entered the Casbah Lounge. At Clark's request Officer Johnson drove the car with James to 101st Street and Broadway, where in a few minutes Clark entered with another man. The four of them then drove to 85th Street between Amsterdam and Columbus Avenues where Clark and the other man left. After a few minutes Clark re-entered the car and delivered 1/8th kilo of cocaine to Officer Johnson who gave him $3,300 (55-56, 92-93).

POINT ONE

THERE WAS INSUFFICIENT EVIDENCE AGAINST APPELLANT WILEY TO SUBMIT THE CASE TO THE JURY

Once again this Court is asking to review the sufficiency of the evidence of a conviction for conspiracy to violate the Federal narcotic laws. There is no evidence appellant:

1) Handled any narcotics;

2) Handled any money;

3) Conferred with any co-defendants about narcotics;

4) Negotiated the sale of any narcotics; or

5) Transported any narcotics or money.

What did Miss Wiley do? On October 17, she told Officer Johnson that Clark had sent her to take Officer Johnson to a location where she could buy cocaine. Nothing about Officer Johnson getting the cocaine from Miss Wiley or Clark. Clearly the seller would be a third person. There was no showing appellant Wiley knew who the potential seller of the cocaine was. All she knew was the location. Officer Johnson refused appellant Wiley's offer and insisted upon dealing only with Clark. Miss Wiley called Clark and then went and brought him to the bar. She remained in the Blue Rose Bar while Clark drove Officer Johnson around the city in appellant's car and eventually sold her an ounce of cocaine.

This Court has stated that in order for the court to submit a case to the jury it must be convinced that upon all of the evidence a reasonable mind might fairly conclude the defendant's guilt beyond a reasonable doubt. United States v Taylor, 464 F. 2d 240 (2d Cir. 1972).

The evidence of appellant Wiley's activities on October 17 do not rise to this standard, nor do appellant's activities on October 24 add anything. On that date she was present during the negotiations between Clark and Officer Johnson and the sale of another ounce of cocaine by Clark to Officer Johnson in Johnson's car. Appellant did nothing and said nothing in furtherance of any plan, scheme or conspiracy to sell cocaine. Admittedly she was present when Clark sold the cocaine to Johnson, but Courts have said numerous times that mere presence or association with conspirators is insufficient to sustain a conviction. United States v Di Re , 332 U.S. 581, 593 (1948); United States v Stromberg, 268 F. 2d 256, 267 (2d Cir. 1959).

While Clark received $1,200 for each ounce of cocaine he sold to Officer Johnson there is no evidence appellant Wiley received any benefit from these sales evidencing her membership and participation in a conspiracy to sell narcotics. United States v Docherty, 468 F. 2d 989 (2d Cir. 1972).

Had appellant Wiley gone forward and taken Officer Johnson

to purchase cocaine she might have entered into a conspiracy with the seller. But, that sale was aborted. Her mere invitation to Officer Johnson was insufficient to establish that she conspired with Clark to distribute cocaine. See, United States v Vela, 499 F. 2d 845 (7th Cir. 1974).

The evidence in the instant case is less than the evidence this Court found insufficient in United States v Freeman, 498 F. 2d 569 (2d Cir. 1974). In that case Freeman:

a) Discussed the purchase of a large quantity of cocaine from a man named Etra and received a sample of cocaine. There was no connection between Etra and the conspirators in the case;

b) Purchased small quantities of cocaine from the principal defendant and once purchased an ounce of cocaine from him - all about 1½ years prior to the transactions in the case;

c) Helped conceal co-defendants after the arrest of the courier defendant; obtained the co-defendants' luggage from their hotel and paid someone else to go to another hotel to get other luggage telling him the owner of the luggage was a cocaine smuggler;

d) Told one of the fugitive defendants to flee the jurisdiction.

This Court in reversing the conviction and dismissing the indictment said at best Freeman was guilty as an accessory after the fact, a crime which was not charged.

In the instant case the jury agreed that appellant Wiley did not aid and abet Clark in the sales on October 17 and 24, but convicted appellant of conspiring with Clark. While cases are legion stating that conspiracy and substantive crimes are different, with different elements of proof, the proof at trial does not sustain the verdict that appellant Wiley conspired with Clark to distribute cocaine.

POINT TWO

APPELLANT WILEY'S SENTENCE WAS EXCESSIVE

Seven years in prison for inviting an undercover police officer to follow to a location where she could buy cocaine. An invitation which was rejected. Just about a year for each two words spoken.*

Until recently Federal appellate courts uniformly agreed that "a sentence imposed by a federal district judge, if within statutory limits, is generally not subject to review." United States v Tucker, 404 U.S. 443, 447, 92 S. Ct. 589, 591, 30L Ed. 2d 592 (1972); see e.g. Gore v United States, 357 U.S. 386, 393, 78 S. Ct. 1280, 2 L Ed. 2d 1405 (1958); Blockburger v United States, 284 U.S. 299, 305, 52 S. Ct. 180, 76L. Ed. 306 (1932); Guerra v United States, 40 F. 2d 338, 340-341 (8th Cir. 1930).

* Appellant James was sentenced to three years imprisonment.

This Court followed this general rule until recently. United States v Brown, 479 F. 2d 1170 (2d Cir. 1973) (but see dissent of Judge Feinberg at page 1175); United States v Velazquez, 482 F. 2d 139 (2d Cir. 1973); United States v Bernstein, 417 F. 2d 641 (2d Cir. 1969).

In recent years more and more appellate courts have taken a more enlightened view of reviewing sentences, remanding for re-sentence or reducing the sentence itself where excessive. United States v Daniels, 446 F. 2d 967 (6th Cir. 1971) (en banc); United States v Charles, 460 F. 2d 1093 (6th Cir. 1972); United States v Wilson, 450 F. 2d 495, 498 (4th Cir. 1971); United States v McKinney, 466 F. 2d 1403 (6th Cir. 1972).

> "We hold that we possess the power to review the severity of a criminal sentence within narrow limits where the court has manifestly or grossly abused its discretion." Woosley v United States, 478 F. 2d 139, 147 (8th Cir. 1973).

This Court questioned the appropriateness of the trial judge's sentence and remanded the case to the district court in McGee v United States, 462 F. 2d 243 (2d Cir. 1972).

The question is whether taking all factors into consideration is the sentence of seven years imprisonment imposed on appellant so excessive as to amount to an abuse of discretion. United States v

Bowser, 497 F. 2d 1017, 1020 (8th Cir. 1974).

In imposing sentence the trial judge explained that the seven year sentence was imposed because of the great problem of drug trafficing in this country. The Court's statement on this point consumes three pages of the transcript (215-217)* and reviews the history of the drug problem in the United States at length. Appellant's only prior criminal involvement with drugs was a conviction for possession of a small amount of cocaine and marijuana. There is no showing from the evidence at trial, appellant's background or any other facts that appellant was a substantial drug trafficer. To the contrary everything points to the fact that appellant was the most minor participant in the distribution of cocaine. A review of the pre-sentence report by this Court will confirm this.

It was improper and severely unfair to penalize appellant, a minor, almost insignificant figure in a narcotic case because the Court wished to warn others not to deal in drugs. For that, I submit, was the reason for appellant Wiley's seven year sentence. The Trial Court stated just prior to imposing sentence:

> "So that my main problem here is: How do we help Congress and how do we help the purpose for which this law is passed unless when people do this it is forcibly brought to their attention, and anybody that knows them and anybody that hears about the case that this is not the thing to do." (217)

*The entire sentencing minutes are reproduced in the joint appendix.

This Court should reduce this seven year sentence or remand the case to the Trial Court for review of the sentence as it did in United States v Schwartz, 500 F. 2d 1350 (2d Cir. 1974) and United States v Driscoll, 496 F. 2d 252 (2d Cir. 1974) and as the Court of Appeals for the First Circuit did in United States v Walker, 469 F. 2d 1377 (1st Cir. 1972).

POINT THREE

APPELLANT WILEY ADOPTS THE ARGUMENTS OF APPELLANT JAMES WHERE APPLICABLE TO HER

CONCLUSION

FOR THE FOREGOING REASONS THE JUDGMENT SHOULD BE REVERSED AND THE CASE DISMISSED OR A RE-SENTENCING ORDERED

Respectfully submitted,

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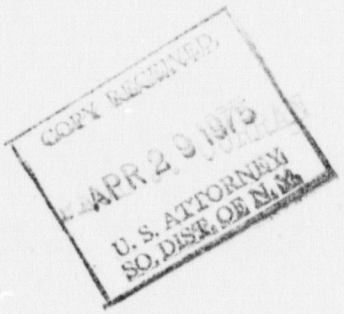
April 29, 1975.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